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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. HECTOR DIAZ, Defendant and Appellant.	B286904 (Los Angeles County Super. Ct. No. VA141740)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Reversed in part and remanded.

Teresa Biagini, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior

Assistant Attorney General, Zee Rodriguez, Supervising Deputy Attorney General, Corey J. Robins, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Hector Diaz was convicted of two counts of assault with a firearm (Pen. Code, § 245, subd. (a)(2) [counts 1 and 2]),[1] two counts of felon in possession of a firearm (§ 29800, subd. (a)(1) [counts 3 and 7]), and one count of unlawful possession of ammunition (§ 30305, subd. (a)(1) [count 4]).[2] The jury found Diaz discharged a firearm proximately causing great bodily injury (§ 12022.7, subd. (a)) in count 1, and personally and intentionally used a firearm in counts 1 and 2 (§ 12022.5, subds. (a), (d)). The jury found that Diaz committed the crimes in counts 1, 2, and 7 for the benefit of, at the direction of, or in association with a criminal street gang. (§ 186.22, subd. (b)(1)(C).)[3] Diaz admitted to serving a prior conviction for a serious felony within the meaning of section 667, subdivision (a)(1), and a

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] There are no counts 5 and 6 listed in the operative information.

[3] The jury found the gang enhancements alleged in counts 3 and 4 not true.

serious or violent felony within the meaning of the three strikes law (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)).

Diaz was sentenced to state prison for a total of 26 years, comprised of the upper term of 4 years in count 1, which was doubled to 8 years as a second strike, plus 3 years for the great bodily injury enhancement, 10 years for the related gun use, and 5 years for the prior serious felony conviction. Diaz was sentenced to the middle term of 3 years in count 2, which was doubled to 6 years as a second strike, plus an additional 4 years for the related gun use, for a total of 10 years to run concurrently with the sentence in count 1. The trial court stayed imposition of sentence on the gang enhancements in connection with counts 1 and 2.[4] The trial court imposed and stayed concurrent terms of two years each in counts 3, 4, and 7 pursuant to section 654.

On appeal, Diaz contends: (1) the trial court erred in denying his motion to sever trial; (2) there is insufficient evidence to support the gang enhancement findings; (3) the trial court erred in permitting the prosecution's gang expert to rely on information obtained from police reports; (4) the prosecutor misstated evidence in closing argument; (5) the cumulative effect of the trial errors violated his due process rights; (6) remand is necessary so the trial court may exercise its discretion to strike the firearm enhancements

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[4] The abstract of judgment does not include the gang enhancement in count 7, which the trial court failed to address at the sentencing hearing.

under section 12022.5, subdivisions (a) and (d) in counts 1 and 2 pursuant to Senate Bill 620; and (7) remand is necessary so the trial court may exercise its discretion to strike the prior conviction enhancement under section 667, subdivision (a)(1), pursuant to Senate Bill 1393.

The Attorney General concedes the matter should be remanded to allow the trial court an opportunity to exercise its discretion to strike the firearm enhancements, but otherwise contests Diaz's claims. We remand the matter to permit the trial court the option, if it so chooses, to exercise its discretion to strike Diaz's firearm and prior conviction enhancements within the confines of section 1385, pursuant to Senate Bill 620 and Senate Bill 1393. We strike the gang enhancements under section 186.22(b)(1)(C) for insufficient evidence. In all other respects the judgment is affirmed.

FACTS

The Prosecution's Case

December 2015 Shooting

At approximately 10:30 a.m. on December 2, 2015, Nadia A. and her two-year old daughter were in Nadia's apartment when Diaz unexpectedly knocked on the door. Nadia and Diaz shared a child but had broken up on hostile terms. Nadia saw Diaz's friend waiting in a car on the street.

Nadia eventually agreed to let Diaz see their daughter outside of the apartment door. After seeing Diaz and the daughter sit down, Nadia continued washing dishes in her apartment. When she turned around, Diaz and the child were gone. Nadia ran outside but could not locate Diaz or her daughter, so she demanded that Diaz's friend call him. Diaz returned five minutes later. Following a brief altercation, Diaz ran after Nadia, who ran inside and tried to lock the door. Diaz put their daughter down and ripped the door open. Nadia ran through the apartment and exited through the bedroom door. Diaz ran after Nadia, threatening to hit her. Nadia screamed.

Nadia's neighbors Andrew N. and Lauren T. exited their apartment after hearing Nadia scream. Andrew, Lauren, and another individual circled around Nadia and demanded that Diaz leave. Diaz began to argue with a group of five men who were walking down the street. Diaz and the men were "exchanging insults and gang things." Diaz pulled a pocket knife from his pants and swung it around. No one but Diaz had a weapon. According to Nadia, Diaz is a member of the Temple Street gang with the moniker "Pollo." Diaz yelled, "Temple, Temple." The men yelled their allegiance to Florencia 13. Nadia yelled for Diaz to leave, so he started to back up and said, "Temple Street. I'll be back." "I'm going to smoke everybody and I'll be back -- Temple." Diaz got into his friend's car and yelled "Pollo" as the car sped away.

Lauren and Andrew went back to their apartment. Nadia called the police. Approximately 10 to 15 minutes later, Lauren and Andrew went back outside so Andrew could smoke a cigarette. Lauren, Andrew, and three other individuals were outside when they saw Diaz in the alley behind the apartment complex. When Diaz was approximately 12 to 21 feet away from the group, he pulled out a handgun, aimed at them, and began to shoot. As the group ran away, Diaz fired four shots. The first bullet went past Andrew's head. The fourth bullet struck Andrew's foot. Diaz jammed the gun on his fifth attempt to shoot. Diaz ran back into the alley and got into the same car that initially drove him to Nadia's apartment. The car sped off.

The Los Angeles County Sheriff's Department recovered four .32 caliber shell casings from the scene. Six days after the shooting, Lauren and Andrew positively identified Diaz in a six-pack photographic lineup. Andrew's right foot required surgical repair because the bullet shattered a bone in his toe.

March 2016 Search of Diaz's Residence

Diaz was arrested at his residence on March 17, 2016. During a search of his residence, Department of Corrections Special Agent Traylor recovered a loaded .22 rifle behind the front door, a loaded .32 handgun on the bed, and magazines and bullets for both caliber guns.

During a March 23, 2016 interview, Diaz told a detective it was "physically impossible" that the handgun recovered from his residence matched the bullet casings at the scene of the December 2, 2015 shooting. The parties stipulated that the bullet casings recovered from the scene of the shooting did not match the handgun that was recovered from Diaz's residence on March 17, 2016.

Gang Evidence

Los Angeles Police Department Officer Paul Cruz testified as an expert on criminal street gangs for the prosecution. During the 12 years he worked as a peace officer, Officer Cruz was trained on criminal street gangs and was assigned gang enforcement detail. Officer Cruz was "[v]ery familiar" with the Temple Street gang. He drove and walked around the neighborhood the gang claims every day. Temple Street has been in existence since 1923 and is a "pretty large" gang, with between 150 and 175 active members. Officer Cruz had personally spoken to approximately 50 to 60 of the Temple Street members, knew Diaz as "Pollo" from Temple Street, and had personally met with Diaz on six or seven occasions. Officer Cruz based his opinion that Diaz is a Temple Street gang member on multiple self-admissions Diaz made to Officer Cruz personally between 2013 and 2016, Diaz's "TST" gang tattoo, and Diaz's associations with other known gang members, including those reflected in photographs. Officer Cruz

opined that Diaz was an active member of Temple Street on December 2, 2015, and March 17, 2016. Under a hypothetical scenario with facts paralleling the facts in this case, Officer Cruz stated he believed the crimes were committed for the benefit of the Temple Street gang.

The Defense's Case

Diaz testified on his own behalf. Diaz went to Nadia's apartment on December 2, 2015 to see his daughter. After he picked up his daughter, Diaz walked around the perimeter of the apartment complex. His friend called him during the walk so Nadia could yell at him. Diaz returned with his daughter and put her inside Nadia's apartment. When Diaz was walking outside, he saw two men. One held a crowbar in his hand, and when Diaz tried to ask who they were, the other man punched him in the face. Diaz fell to the ground. While he was getting up, Diaz saw Andrew behind him and heard a noise resembling a Taser. In response, Diaz pulled out a knife. Diaz heard Lauren say, "Gun," and when he turned around, Diaz saw one of the men shooting. Diaz ran to his friend's car and left the scene. He did not return.

Diaz got his gang tattoo when he was 13 or 14 years old and was no longer an active gang member in December 2015. During his time in the gang, Diaz would "sell drugs. Stuff like that." Diaz stopped participating in gang activity.

He denied telling Officer Cruz he was a Temple Street gang member.

DISCUSSION

Motion to Sever

Prior to trial, Diaz filed a motion to sever the counts associated with the search of his residence on March 17, 2016 (counts 3 and 4), from those associated with the shootings on December 2, 2015 (counts 1, 2, and 7). In his motion, Diaz contended that counts 3 and 4 could not be properly tried with counts 1 and 2 because they did not meet the requirements for joinder under section 954. Diaz argued the charges were (1) not in the same class of crimes or offenses, and (2) did not involve the same gun and therefore did not share a "common element of substantial importance." Diaz further contended that even if joinder was proper under section 954, due process required severance of the counts. He asserted that the facts of each incident were not cross-admissible because the incidents involved different firearms, and that joinder would impermissibly allow the prosecution to use the stronger possession of a firearm case to bootstrap the weaker shooting case.

The prosecution opposed the motion, contending the offenses were of the same class of crimes, and that there was no substantial danger of prejudice from trying all counts together because the evidence was cross-admissible.

The trial court denied Diaz's motion.

Legal Principles

"An accusatory pleading may charge two or more different offenses connected together in their commission, or . . . two or more different offenses of the same class of crimes or offenses . . . . [T]he court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately." (§ 954.) "'Offenses "committed at different times and places against different victims are nevertheless 'connected together in their commission' when they are . . . linked by a "'common element of substantial importance.'"'" (*People v. Mendoza* (2000) 24 Cal.4th 130, 160.)" (*People v. Anderson* (2018) 5 Cal.5th 372, 388.)

"A conclusion as to whether two or more offenses are properly joined under Penal Code section 954 is examined independently as the resolution of a pure question of law—whether the offenses are 'different statements of the same offense' or are 'of the same class of . . . offenses' (Pen. Code, § 954)—or the resolution of a predominantly legal mixed fact-law question—whether the offenses were 'connected . . . in their commission' (*ibid.*)." (*People v. Alvarez* (1996) 14 Cal.4th 155, 188.)

Where two cases are erroneously consolidated for trial, "a reversal will not be had unless there is such a miscarriage of justice as would violate article VI," section 13 of the California Constitution. (*People v. Saldana* (1965) 233 Cal.App.2d 24, 30–31; see generally *United States v. Lane* (1986) 474 U.S. 438, 446, fn. 8 ["misjoinder would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial"].) "[A] 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Analysis

We reject Diaz's contention, because even if the counts did not meet the requirements for joinder under section 954, he has not demonstrated there is a reasonable probability that he would have obtained a more favorable result if counts 3 and 4 had not been joined with counts 1, 2, and 7.[5]

[5] Because we conclude that, even assuming the counts were improperly joined, Diaz has not established there is a reasonable probability that he would have obtained a more favorable result in the absence of error, we need not proceed

The evidence supporting Diaz's convictions in the counts associated with the search of the residence was so strong that Diaz "directed [his counsel] to concede" because "when he's guilty of something, he's going to take his lumps." Defense counsel then used Diaz's statement that the police could not have found the gun that was used to shoot Andrew in the search on March 17, 2016, as proof that he was *not* the shooter in the December 2, 2015 incident.

The evidence supporting Diaz's convictions in the counts associated with the shooting was also extremely strong. Diaz conceded that he was present at the scene, engaged in a confrontation with the group of men, and held a knife in his hand during that confrontation. His defense rested entirely on the theory that Andrew was injured by "friendly fire"—i.e. that someone in Florencia 13 shot him—although there was no evidence that either Andrew or Lauren knew the men in the group or had engaged in an altercation with them. Diaz asserted that Andrew, Lauren, and Nadia fabricated a story to blame him rather than the actual shooter simply to get him out of Nadia's life.

The prosecution presented very strong evidence in support of its theory that Diaz was the shooter. Andrew and

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to the issues of whether the court's denial of the severance motion was an abuse of discretion (*People v. Johnson* (2015) 61 Cal.4th 734, 750), or whether denial of the severance motion had the actual impact of "'depriv[ing] [Diaz] of a fair trial or due process of law' [citation]" (*People v. Bean* (1988) 46 Cal.3d 919, 934–940).

Lauren identified Diaz as the shooter in both photographic lineups and in open court. They unequivocally testified to Diaz's actions before, during, and after the shooting. Andrew, Lauren, and Nadia all testified that Diaz yelled "Temple, Temple," and that the men responded they were members of the Florencia 13 gang. Nadia testified that Diaz said he would be back to "smoke" everyone and yelled out his gang moniker. The testimony was corroborated by Nadia and Officer Cruz's firsthand knowledge of Diaz's gang affiliation. There was overwhelming evidence that Diaz shot at the two groups of people, injuring Andrew in the process, and that he acted for the benefit the Temple Street gang when he did so.

The jury was thoroughly instructed regarding the factors it was permitted to consider and the ways in which it could evaluate witness credibility under CALJIC Nos. 2.20, 2.21.1, and 2.21.2. Clearly, it found the prosecution's eyewitnesses credible and dismissed Diaz's unlikely version of the events. We presume that jurors are intelligent and capable of understanding and following the court's instructions (*People v. Lewis* (2001) 26 Cal.4th 334, 390), and we have no reason to believe that the jury did not do so here.

Finally, the jury was instructed that Diaz was presumed innocent, that the prosecution had the burden to establish his guilt beyond a reasonable doubt (CALJIC Nos. 2.90 and 2.91), and that it must decide each count separately (CALJIC No. 17.02). The jury's finding that the gang enhancements charged in connection with Diaz's possession

of a firearm and ammunition on March 17, 2016 were not true, despite its true findings on the gang allegations in counts 1, 2, and 7, further bolsters the conclusion that the jurors considered the counts separately and were not influenced by joinder of the charges. Because he has not established prejudice, Diaz's contention necessarily fails.

Gang Enhancements

Diaz makes several contentions relating to the jury's true findings on the gang enhancements in counts 1, 2, and 7. We agree that the evidence was insufficient to establish the Temple Street gang's primary activities, and therefore strike the gang enhancements in those counts. We find no merit in the remaining contentions relating to the jury's gang findings, but we address the issues because Diaz contends that he was prejudiced by cumulative error.

Proceedings

To prove the gang enhancements alleged in counts 1, 2, and 7, the prosecution examined Officer Cruz, who had driven, walked, and conducted foot beats in Temple Street territory daily, and had personally spoken to between 50 and 60 active Temple Street gang members. Officer Cruz personally investigated crimes committed by Temple Street gang members, including "[c]riminal threats, vandalisms,

robberies, attempt[ed] murders, assault with a deadly weapon, [and] possession of handguns."

Officer Cruz was questioned regarding a certified minute order reflecting that Amir Ahmadi was convicted of criminal threats in connection with an incident that took place on October 5, 2015. Officer Cruz was familiar with the incident through the police reports and speaking with investigating officers, and knew Ahmadi personally. In Officer Cruz's opinion, Ahmadi was a member of Temple Street when he committed the crime.

Officer Cruz was also questioned regarding a certified minute order reflecting that Gabriel De Los Reyes was convicted of a robbery that occurred on January 2, 2013. Officer Cruz knew De Los Reyes personally, but became familiar with the crime through reading the crime reports and speaking with arresting officers. Officer Cruz opined that De Los Reyes was a member of Temple Street gang when he committed the robbery.

Defense counsel objected to Officer Cruz's testimony regarding Ahmadi and De Los Reyes under *People v. Sanchez* (2016) 63 Cal.4th 665. Outside the presence of the jury, counsel argued that the prosecution would have to bring in the reporting officers if Officer Cruz was "only relying on information he heard from other officers." Officer Cruz testified that he personally spoke with the investigating officers and learned the facts surrounding the convictions based on the conversations. The People argued

that the conversations negated any issue with *Sanchez*. The court agreed and overruled the objection.

Analysis

Sufficiency of the Evidence

Diaz first contends the jury's true findings on the gang enhancements should be stricken because the evidence was insufficient to prove the existence of a criminal street gang. He argues that the gang expert did not quantify the number of enumerated crimes used to establish the gang's primary activities, and lacked personal knowledge of predicate crimes to prove the gang's pattern of criminal conduct.[6] We agree that the prosecution did not introduce sufficient evidence of the gang's primary activities, and strike the gang enhancements.

"When we review a challenge to the sufficiency of the evidence to support a conviction we apply the substantial

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[6] In his opening brief, Diaz asserts that to the extent his counsel's failure to object to admission of certain testimony by Officer Cruz forfeits those claims on appeal, counsel provided ineffective assistance. With respect to his sufficiency of the evidence arguments, counsel's failure to object does not forfeit the issue, so we need not address that claim. (*People v. Trujillo* (2010) 181 Cal.App.4th 1344, 1350, fn. 3 [sufficiency of the evidence claims may be raised at any time].)

evidence standard. Under that standard the reviewing court examines the entire record to determine whether or not there is substantial evidence from which a reasonable jury could find beyond a reasonable doubt that the crime has been committed. In reviewing that evidence the appellate court does not make credibility determinations and draws all reasonable inferences in favor of the trial court's decision. We do not weigh the evidence but rather ask whether there is sufficient reasonable credible evidence of solid value that would support the conviction. (*People v. Johnson* (1980) 26 Cal.3d 557, 576–578.)" (*People v. Russell* (2010) 187 Cal.App.4th 981, 987–988.) "'All conflicts in the evidence and questions of credibility are resolved in favor of the verdict.'" (*People v. Lara* (2017) 9 Cal.App.5th 296, 314 (*Lara*).)

Under section 186.22, subdivision (b)(1), a criminal defendant is subject to additional punishment for a felony or attempted felony when the offense is "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).)

A "criminal street gang" is defined as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of [section 186.22] subdivision (e), having a

common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity." (§ 186.22, subd. (f).)

"'To establish that a group is a criminal street gang within the meaning of the statute, the People must prove: (1) the group is an ongoing association of three or more persons sharing a common name, identifying sign, or symbol; (2) one of the group's primary activities is the commission of one or more statutorily enumerated criminal offenses; and (3) the group's members must engage in, or have engaged in, a pattern of criminal gang activity. [Citations.]' (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1457 [(*Duran*)].)" (*Lara*, *supra*, 9 Cal.App.5th at p. 326.)

Diaz challenges the sufficiency of the evidence supporting the second and third requirements.

Primary Activities

Diaz contends Officer Cruz's testimony, in which he listed the types of crimes he personally investigated involving Temple Street gang members, is insufficient to establish that one of the group's primary activities is the commission of one or more statutorily enumerated criminal offenses under section 186.22, subdivision (f). In particular, he argues that the officer did not testify regarding the "number and frequency" of the crimes committed by gang members.

The "primary activity" element requires that the commission of the specified crimes be "'one of the group's "chief" or "principal" occupations'" as opposed to the occasional commission of those crimes by the group's members. (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1222 (*Vy*).) "Evidence of both past offenses and the currently charged offenses may be considered in determining whether one of the primary activities of the gang is committing one or more of the offenses enumerated in the statute." (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1068.)

"Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324 (*Sengpadychith*).) Sufficient proof of the gang's primary activities might also be admitted in the form of expert testimony, where the expert expresses an opinion on the gang's primary activities. (*Ibid.* [noting that the kind of expert testimony given in *People v. Gardeley* (1996) 14 Cal.4th 605, 620 (*Gardeley*)—where "a police gang expert testified that the gang . . . was primarily engaged in the sale of narcotics and witness intimidation"—was sufficient.]) An expert's testimony may be "founded on his or her conversations with gang members [or] personal investigation of crimes committed by gang members . . . ." (*Duran*, *supra*, 97 Cal.App.4th at p. 1465.)

We conclude the evidence here was not sufficient to support the jury's finding that Temple Street's primary

activities included the commission of statutorily enumerated criminal offenses. In reaching this conclusion, we do not in any way suggest that Officer Cruz, the prosecution's gang expert, lacked the qualifications or base of knowledge to offer an opinion on Temple Street's primary activities. Officer Cruz, a peace officer of 12 years, was assigned to the gang enforcement detail, had extensive personal experience dealing with the Temple Street gang, and had testified as a gang expert before this trial. He had personally investigated "[c]riminal threats, vandalisms, robberies, attempt[ed] murders, assault with a deadly weapon, [and] possession of handguns" committed by Temple Street members. These crimes are enumerated under section 186.22, subdivision (e), and could potentially support the jury's findings. (§ 186.22, subds. (e)(1) [assault with a deadly weapon]; (e)(2) [robbery]; (e)(3) [unlawful homicide]; (e)(20) [vandalism]; (e)(23) [possession of firearm capable of being concealed]; (e)(24) [criminal threats].)

In contrast to the expert testimony presented in the cases relied upon by the People, however, here the prosecution neglected to ask Officer Cruz about Temple Street's primary activities or otherwise elicit his opinion on the issue. As noted above, the expert in *Gardeley* testified the gang's primary activities included the sale of narcotics and witness intimidation. (*Gardeley*, *supra*, 14 Cal.4th at p. 620.) In *Vy*, *supra*, 122 Cal.App.4th at page 1219, the expert testified that assaults, assaults with a deadly weapon, and attempted murder were primary activities of

the gang. In *Duran*, the expert was asked about the gang's primary activities; while his answer referenced "putting fear into the community," he went on to explain this meant often committing assaults with a deadly weapon and narcotics sales sufficient to control sales in the community. (*Duran*, *supra*, 97 Cal.App.4th at p. 1465.) In *People v. Margarejo* (2008) 162 Cal.App.4th 102 at page 107, the expert was asked what the "primary activities" of the gang were, and he responded that "[t]heir activities range from simple vandalism and battery, and extend all the way to murder. They also include consolidated weapons, carjacking, robberies and a lot of narcotic related offenses." (*Ibid.*) The *Margarejo* court rejected the defendant's argument that there was no testimony on the gang's "primary activities" because the expert did not repeat the word "primary" in his answer, reasoning "the jury had ample reason to infer that [the expert's] answer implicitly incorporated the word 'primary' from the question." (*Ibid.*)

Officer Cruz's listing of crimes by Temple Street members that the officer personally investigated, in contrast, was made without reference in either the question or answer to whether any of those crimes were primary activities of the gang, how many crimes he personally investigated, or when during his 12 years of experience and interaction with gang members the crimes occurred. Although the trier of fact could reasonably infer from Officer Cruz's list that he was referencing a number of investigations, given the size of the gang—150 to 175 active members—no reasonable inference

could be drawn that these were the gang's primary activities. Even when considered alongside the charges against Diaz in the current case, the prosecution's specific evidence of the convictions of two Temple Street members, one in 2013 and one in 2015, for criminal threats and robbery, is insufficient to support a finding as to the gang's primary activities. Although proof of a few crimes may constitute sufficient evidence of the primary activities of a smaller, more recently established gang, given the size and longevity of Temple Street, such evidence is not sufficient. (See *Vy*, *supra*, 122 Cal.App.4th at p. 1225 ["the existence of three violent felonies by a gang as small as YA [with approximately six members] over less than three months [is] sufficient to satisfy the 'primary activities' element"].) Five examples of qualifying crimes in section 186.22, subdivision (e), are simply too small a sample from which to infer Temple Street's primary activities. Because we conclude the record does not contain sufficient evidence to support the jury's true findings as to the required element of "primary activities," the gang enhancements in counts 1, 2, and 7 must be stricken.[7]

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[7] As we noted in footnote 4, the abstract of judgment does not include the gang enhancement in count 7, which the trial court failed to address at the sentencing hearing. However, because we hold that the gang enhancement in that count must be stricken, it is unnecessary to order the trial court to amend the abstract of judgment as it relates to

Pattern of Criminal Activity

Diaz contends Officer Cruz's testimony was insufficient to establish a pattern of criminal activity by the Temple Street gang because he lacked personal knowledge of the predicate crimes committed by Temple Street members that were used to demonstrate a pattern of criminal activity.

Section 186.22, subdivision (e) defines "pattern of criminal gang activity" as "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided . . . the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons: [¶] (1) Assault with a deadly weapon or by means of force likely to produce great bodily injury, as defined in Section 245. [¶] (2) Robbery, as defined in Chapter 4 (commencing with Section 211) of Title 8. [¶] . . . [¶] (24) Threats to commit crimes resulting in death or great bodily injury, as defined in Section 422. [¶] . . . [¶] (31) Prohibited possession of a firearm in violation of Section 12021 until January 1, 2012, and on or after that date, Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6."

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the gang enhancement in count 7, which accurately reflects our disposition.

In this case, it is undisputed that the crimes committed by Ahmadi and De Los Reyes took place within the statutory period and occurred within three years of each other. Certified minute orders were admitted to establish convictions for criminal threats and robbery.[8] (*Duran*, *supra*, 97 Cal.App.4th at pp. 1461–1462 [certified minute order is admissible to prove the fact of a conviction and that the offense reflected in the record occurred].) Officer Cruz personally knew both gang members. Substantial evidence supports the jury's finding that the Temple Street gang members "engage in, or have engaged in, a pattern of criminal gang activity." (See *id.* at pp. 1457, 1459–1460 [combination of minute order documenting another gang member's guilty plea to possession of cocaine base for sale and testimony of a police expert on gangs personally acquainted with defendant and other gang member sufficient to establish predicate offense required for finding of pattern of criminal gang activity].)

[8] Diaz contends on appeal that there was no record of conviction indicating De Los Reyes suffered a conviction, but the Clerk's Transcript includes as part of a trial exhibit the certified minute order of De Los Reyes's no contest plea to robbery.

Confrontation Clause

Diaz contends the trial court prejudicially erred in admitting Officer Cruz's hearsay testimony concerning the conduct underlying Ahmadi and De Los Reyes's convictions in violation of *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*) and the Confrontation Clause of the Sixth Amendment. We disagree.

"Hearsay, defined as 'evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated,' is inadmissible unless it falls under an exception. (Evid. Code, § 1200, subds. (a), (b).) A statement 'offered for some purpose other than to prove the fact stated,' however, is not hearsay. [Citation.]" (*People v. Roa* (2017) 11 Cal.App.5th 428, 442.) "The confrontation clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.' (*Crawford* [*v. Washington* (2004)] 541 U.S. [36,] 59, fn. 9.)" (*Sanchez, supra*, 63 Cal.4th at p. 674.)

An expert may express an opinion on "a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).) "In addition to matters within their own personal knowledge, experts may relate information acquired through their training and experience, *even though that information may have been derived from conversations with others*, lectures, study of learned treatises, etc." (*Sanchez*, *supra*, 63

Cal.4th at p. 675, italics added.) "Knowledge in a specialized area is what differentiates the expert from a lay witness, and makes his testimony uniquely valuable to the jury in explaining matters 'beyond the common experience of an ordinary juror.' [Citations.] As such, an expert's testimony concerning his general knowledge, *even if technically hearsay*, has not been subject to exclusion on hearsay grounds." (*Id.* at p. 676, italics added.)[9]

Under *Sanchez*, an expert may not relate "*case-specific* facts about which the expert has no independent knowledge. Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez, supra*, 63 Cal.4th at p. 676; see *id.* at p. 686.) The *Sanchez* "decision [did] not call into question the propriety of an expert's testimony concerning background information regarding his knowledge and expertise and premises generally accepted in his field. Indeed, an expert's background knowledge and experience is what distinguishes him from a lay witness, and . . . testimony relating such background information has never been subject to exclusion as hearsay, even though offered for

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[9] The trial court instructed the jury that they were not bound by an expert opinion, and that the jurors should decide what weight to give to an expert opinion, disregarding any opinion the jurors found unreasonable. The jurors were also instructed that statements considered by an expert witness which were made to the expert witness or a third person did not prove that what was said was true.

its truth. Thus, [the] decision does not affect the traditional latitude granted to experts to describe background information and knowledge in the area of his expertise." (*Id.* at p. 685.)

In sum, *case-specific* out-of-court statements which are treated as true and accurate to support the expert's opinion are hearsay under state law, and if the statements were testimonial, admission of the statements through the expert may violate the Sixth Amendment's confrontation clause. (*Sanchez, supra*, 63 Cal.4th at p. 686.) However, when such statements are not case-specific, or do not relate to "the particular events and participants alleged to have been involved in the case being tried," an expert may render an opinion based upon matters "'perceived by or personally known to [him] or made known to him . . . before the hearing, *whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion*'" within his expertise. (*Id.* at pp. 678–679, 686; Evid. Code, § 801, subd. (b).) Thus, a gang expert may rely on and relate facts, based on information learned through his experience and education regarding a gang's operations, primary activities, and pattern of criminal activities; and may give an opinion regarding predicate crimes and the membership status of the perpetrators, even if some of the information may be testimonial hearsay so long as the perpetrators are not also participants in the current crime, and the information does not relate to the particular events of the defendant's case. (See *People v. Meraz* (2016) 6

Cal.App.5th 1162, 1174–1175, review granted Mar. 22, 2017, S239442; but see *People v. Ochoa* (2017) 7 Cal.App.5th 575, 589 [admissions by defendant's associates are case-specific].)

We agree with the Attorney General that Officer Cruz's testimony regarding the commission of predicate crimes by Ahmadi and De Los Reyes was admissible as part of an expert's general knowledge about the gang's history, membership, and pattern of criminal activity, unrelated to the "particular events and participants alleged to have been involved in the case being tried." (*Sanchez*, *supra*, 63 Cal.4th at p. 676; see *People v. Blessett* (2018) 22 Cal.App.5th 903, 945 (*Blessett*) ["A predicate offense and the underlying events are essentially a chapter in the gang's biography. Thus, they are relevant to a gang expert's opinion about whether a group has engaged in a pattern of criminal gang activity and is a criminal street gang under the statutory definition"].) Such background information did not violate Diaz's confrontation clause rights because it is not testimonial for confrontation clause purposes. (*Blessett*, *supra*, at p. 948; *People v. Valadez* (2013) 220 Cal.App.4th 16, 35 ["general background information [the officer] obtained from gang members, other officers, and written materials on the history of the [gang] . . . plainly does not qualify [as testimonial]"].)

Misconduct

Diaz contends the prosecutor committed misconduct during closing argument by misstating the evidence with regard to the Temple Street gang's primary activities. Diaz forfeited the argument by failing to raise it below, but because he argues trial counsel was constitutionally ineffective, we address the merits.

Proceedings

At various times during trial, the judge instructed the jury that statements made by the attorneys are not evidence unless stipulated. The court admonished the jury that closing arguments allowed the lawyers to "tell you what they think the evidence proves" and what their "view" is on the evidence only.

Following a recitation of the facts and law on the underlying charges, the prosecution stated the following regarding gang enhancements:

"What are their primary activities? [¶] Among their primary activities -- robbery, criminal threats, assault with deadly weapons. [¶] . . . [¶] [W]hen Officer Cruz was on the stand, I approached and I said -- and I said are you familiar with Amir Ahmadi . . . . [¶] And then I also asked if he was familiar with a Gabriel De Los Reyes . . . [¶] And he said yes as to both of those." "[T]hese prior convictions, according to Officer Cruz, these two individuals were members of

Temple Street when they committed the criminal threat and robbery. [¶] So this is an essential element of the criminal street gang allegation. [¶] That's how that is proved up. [¶] That's how you know that their members have engaged in a pattern of criminal activity."

Analysis

"To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003 (*Cunningham*), citing *Strickland v. Washington* (1984) 466 U.S. 668, 687–694 (*Strickland*).) "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' (*Strickland*[, *supra*,] at p. 694; *People v. Riel* (2000) 22 Cal.4th 1153, 1175.)" (*Cunningham*, *supra*, at p. 1003.)

"The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to

make the conviction a denial of due process.'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'" [Citation.] . . . Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841; accord, *People v. Hill* (1998) 17 Cal.4th 800, 819 (*Hill*).)

Prosecutors may not misstate the evidence. (*People v. Davis* (2005) 36 Cal.4th 510, 550.) They are, however, given wide latitude during argument, and may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences or deductions to be drawn therefrom. (*People v. Hamilton* (2009) 45 Cal.4th 863, 928; *Hill*, *supra*, 17 Cal.4th at p. 819.) A prosecutor has a "'wide-ranging right to discuss the case in closing argument[, including] the right to fully state his views as to what the evidence shows and to urge whatever conclusions he deems proper.' [Citation.]" (*People v. Panah* (2005) 35 Cal.4th 395, 463 [prosecutor did not commit misconduct by pointing out his view of the evidence overcame the beyond reasonable doubt presumption].)

Here, there is no reasonable probability that Diaz would have obtained a more favorable outcome if his

attorney objected to the prosecutor's comments, because the record does not demonstrate that the prosecutor misstated the evidence. Rather, the prosecutor permissibly stated her views regarding what the evidence showed—that Ahmadi's and De Los Reyes's convictions, together with the current charges against Diaz, established the primary activities element under the gang enhancement statute. (See *Sengpadychith*, *supra*, 26 Cal.4th at p. 323 [prior criminal activities and current charges may be used to establish primary activities element in section 186.22].) Although we conclude that this evidence falls short of the substantial evidence necessary to sustain the gang enhancements, the prosecutor's arguments relying on the evidence that was in the record was proper. Because the prosecution's closing argument was proper, counsel's failure to object is not a basis for ineffective assistance. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 118.)

Cumulative Error

Diaz contends that even if no single error warrants reversal, the cumulative effect of the errors at trial mandates reversal. We disagree.

"The 'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.' [Citation.]" (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.) Here, we review Diaz's claim of cumulative error to determine whether it is "reasonably probable a result more favorable to

defendant would have been reached in the absence of the alleged errors." (*People v. Carrera* (1989) 49 Cal.3d 291, 332 [citing the standard in *People v. Watson* (1956) 46 Cal.2d 818, 836]; see *People v. Millwee* (1998) 18 Cal.4th 96, 168 [Supreme Court rejects defendant's cumulative prejudice argument, stating "[o]ur careful review of the record persuades us that the trial was fundamentally fair and its determination reliable."].)

Diaz fails to show that the prosecution offered, or the court admitted, any impermissible evidence or argument. That we have concluded the People's evidence supporting Temple Street's primary activities fell short of what is required under section 186.22 does not undermine the fact that Diaz received a fair trial and due process. Diaz conceded his guilt on the felon in possession charge from March 17, 2016, and the evidence that he was the shooter on December 2, 2015 was very strong. This evidence, coupled with the jury's careful determination distinguishing between the two dates as to whether the crimes were for the benefit of Temple Street—it found that the March 17, 2016 crimes were not committed for the benefit of a gang, whereas the December 2, 2015 shooting was—further support that the trial was fundamentally fair and its determination reliable. Diaz fails to show cumulative error that should result in reversal.

Firearm Enhancements

Diaz contends, and the Attorney General concedes, that the trial court now has discretion under recently enacted Senate Bill No. 620 to strike the section 12022.5, subdivisions (a) and (d) firearm enhancements in counts 1 and 2. Diaz requests that the case be remanded to allow the trial court to exercise its discretion to strike the firearm enhancements, because the court lacked the power to do so at the time of sentencing.

When Diaz was charged, convicted, and sentenced, section 12022.5, subdivision (a) mandated that "any person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of that offense." Section 12022.5, subdivision (d) provided: "[n]otwithstanding the limitation in subdivision (a) relating to being an element of the offense, the additional term provided by this section shall be imposed for any violation of Section 245 if a firearm is used . . . ." After Diaz was convicted, but before the cause was final on appeal, the Governor signed Senate Bill No. 620, which amends former section 12022.5, subdivision (c), to permit the trial court to strike a firearm enhancement as follows: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The

authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, § 1.)

At the time of sentencing, the trial court did not have discretion to strike the firearm use findings under section 12022.5, subdivision (c). We therefore remand the matter to the trial court to exercise its discretion under Senate Bill No. 620 to either strike or impose the section 12022.5, subdivisions (a) and (d) firearm use enhancements within the confines of section 1385.

Senate Bill 1393

In a supplemental brief, Diaz contends, and the Attorney General concedes, that the trial court now has discretion under recently enacted Senate Bill No. 1393 to strike the section 667, subdivision (a)(1) enhancement in count 1.

Senate Bill 1393, signed into law on September 30, 2018 and effective on January 1, 2019, amends sections 667 and 1385 to provide the trial court with discretion to strike five-year enhancements pursuant to section 667, subdivision (a)(1), in the interests of justice. We agree with the parties that the law is applicable to Diaz, whose appeal was not final on the law's effective date. Accordingly, we remand the matter for the trial court to consider whether to exercise its discretion to strike the section 667, subdivision (a)(1) enhancement.

DISPOSITION

We remand the matter to the trial court and order that the abstract of judgment be amended to reflect that the gang enhancements in counts 1 and 2 are stricken. On remand, the trial court is to determine whether to exercise its discretion to strike the firearm enhancements in counts 1 and 2 (§ 12022.5, subds. (a), (d)), and the five-year prior serious felony conviction enhancement (§ 667, subdivision (a)(1)). The trial court is directed to forward a certified copy of the amended abstract of judgment to the Department of Corrections. In all other respects, the judgment is affirmed.

MOOR, J.

We concur:

BAKER, Acting P.J.

JASKOL, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.